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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGELIO ZEPEDA,

Defendant and Appellant.

B148742

(Super. Ct. No. BA197221)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Maureen Duffy-Lewis, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Rogelio Zepeda appeals the judgment entered after conviction by jury of one count of attempted murder in which Zepeda personally discharged a firearm and one count of attempted willful, deliberate and premeditated murder in which Zepeda personally discharged a firearm causing great bodily injury. (Pen. Code, §§ 664/187, 12022.53, subds. (c) and (d).) The trial court sentenced Zepeda to a term of 34 years to life in state prison. We reject Zepeda's various claims as well as his request for appointment of new counsel on appeal and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Prosecution's evidence.

Viewed in accordance with the usual rule of appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that on January 6, 2000, at approximately noon, Jesus S. was driving his Ford Explorer south on Long Beach Boulevard with his brother, Cesar S., in the front passenger seat and Cesar's two-year-old son in the back seat. Jesus and Cesar saw Zepeda standing on the corner at 32nd or 33rd Street with a several other males. Zepeda was wearing a black or dark blue hooded sweatshirt and dark baggy pants. As Jesus drove past at approximately 40 miles an hour, Zepeda made "gang signs" in the air with his hands and Cesar responded by giving Zepeda the "[f]inger."

Zepeda ran to the middle of the street, made more gang signs, then returned to the corner and got into the front passenger seat of a Chevrolet Caprice which already was occupied by a driver and a rear passenger. The Caprice followed the Explorer with its

headlights on. Cesar saw Zepeda enter the Caprice and watched the Caprice follow them in the Explorer's side view mirror. Jesus noticed the Caprice weaving in traffic behind them. Southbound traffic on Long Beach Boulevard was detoured to Compton Boulevard. When Jesus stopped for a traffic light in the number one southbound lane at 51st Street, the Caprice drove south in the number one northbound lane and stopped next to the Explorer. Cesar testified he saw Zepeda's face as the Caprice approached from the rear and when "they got in front of us and he took out the gun and pointed it at our faces" Zepeda leaned out the passenger window of the Caprice and fired fourteen rounds into the Explorer. Cesar ducked and covered his head with a stereo amplifier. Cesar was grazed by one bullet and bruised by another that hit his seat. Cesar's son was not physically harmed. Jesus was shot in the jaw, arm and neck and five times in the chest. His jaw and arm were fractured by gunshots, he underwent surgery to remove bullets from his chest and he has numerous scars from the incident.

After the shooting, Cesar took police officers to the location where Zepeda made the gang signs and then went to the Newton station where Los Angeles Police Officers Miguel Terrazas and Miguel Salcedo showed Cesar books of photographs of 38th Street gang members. Cesar looked at approximately 300 photographs in eight different folders and selected two photographs, both of which depicted Zepeda. Cesar testified he was 90 percent certain of his identification after seeing Zepeda in the first photograph and became 100 percent certain after finding the second photograph in another book. Cesar

admitted seeing the first photograph made the second selection easier. Cesar also identified Zepeda in a photographic lineup later that day and at trial.

Norma R. witnessed the shooting from the sidewalk. She saw the Caprice approach at a high rate of speed and saw Zepeda reach out the front passenger window with a gun and fire 11 or 12 shots. When Los Angeles Police Detective Richard Arciniega interviewed Norma R. shortly after the shooting, she was very nervous and told Arciniega she “did not get a good look at the driver, . . . and all I could see was a black semiautomatic gun.”

On the morning of January 7, 2000, Zepeda was arrested at his residence and various items of clothing, including baggy dark blue pants and a black hooded sweatshirt, were seized.

On January 17, 2000, Los Angeles Police Officer Lisa Duran went to Norma R.’s home to show her a photographic lineup. Duran, who is not fluent in Spanish, showed Norma R. an admonition written in Spanish and Norma R. indicated she understood it. Norma R. immediately selected Zepeda’s photograph and then said something in Spanish. Duran telephoned Detective Arciniega who spoke to Norma R. in Spanish and told her to circle the photograph of anyone she recognized, initial the circle and write what the person did on a piece of paper. Duran then circled Zepeda’s photograph, signed the lineup and wrote in Spanish: “He is the man that I saw in the [Caprice]. . . . The one who fired at the other car.” Norma R. testified she was 90 percent certain of her identification at the time of the photographic lineup and “very, very sure” of her

identification at trial. On cross-examination, Norma R. admitted seeing the photograph of Zepeda helped her to remember Zepeda's appearance.

On January 26, 2000, Duran showed Jesus S., who was still hospitalized as a result of this attack, a photographic lineup. Jesus at first refused to make an identification. However, after Duran assured Jesus there would be no trouble for his family, Jesus identified Zepeda as the individual who made the gang sign at the corner and shot at them. Jesus dictated a statement to Duran which stated: "The guy in picture No. 2 [Zepeda] is the one who shot me. I'm positive it's him." At trial, Jesus confirmed he was 100 percent certain of his identification of Zepeda as the shooter.

On cross-examination, Cesar, Norma R. and Jesus each admitted Zepeda was the thinnest individual depicted in the photographic lineup.

2. Defense evidence.

A forensic scientist tested the clothing recovered from Zepeda's home and found no evidence of gunshot residue.

Zepeda's brother, Jorge Medina, testified he and Zepeda were at their home on East 44th Street on the day of the shooting. Zepeda left for a while that morning, but returned before 11:00 a.m. and reported he had been chased by rival gang members. However, on the day of Zepeda's arrest, Medina told the police that Zepeda left at about 11:30 a.m. to get a picture of a fellow gang member who had been fatally shot. When Zepeda returned approximately 20 minutes later, he was smiling, but not laughing, and

“breathing fast.” Medina testified he had never seen Zepeda wear the clothing taken in the search of their home.

Twenty-year-old Zepeda testified in his own defense. He admitted he has been a member of the 38th Street gang for about four years and that the exterior of his residence has gang graffiti “all over it.” On the morning of January 6, 2000, Zepeda intended to go to the home of a deceased friend. However, he was chased by rival gang members in a blue truck and had to return home. Zepeda took some pills because he was “very scared” and stayed at home for the rest of the day. Zepeda denied he had ever worn the clothing seized from his home and denied he had played any part in the shooting incident.

3. The argument of the parties.

The prosecutor noted, among other things, that Zepeda was not the only thin individual depicted in the books of photographs shown to Cesar S. In fact, the page from which Cesar first selected Zepeda contained two photographs of another thin individual but this had failed to suggest to Cesar that he should pick that individual.

Defense counsel argued Cesar’s identification of Zepeda from the books was suggestive because Zepeda’s picture appeared twice and, after Cesar already had seen Zepeda’s photograph, the identification was tainted. Defense counsel noted Cesar had only been 90 percent certain of the identification after he saw the first picture and did not become certain until he saw the photographic lineup. Further, the photographic lineup unfairly suggested Zepeda should be selected because Zepeda was the thinnest individual in the lineup and the shooter had been described by Cesar S. and Norma R. only as thin.

Defense counsel noted Cesar and Jesus had little opportunity to observe the individual on the corner because they drove past at 40 or 50 miles per hour. Additionally, Jesus was only 90 percent certain after looking at the tainted photographic lineup but was 100 percent sure when he came to court. Thus, the tainted photographic lineup must have reinforced the initial identification. Defense counsel argued Norma R. had only been 90 percent certain of her identification at the time of the photographic lineup.

4. *Verdicts and sentencing.*

The jury quickly reached verdicts on counts 1 and 2 but hung on a third count alleging attempted murder of Cesar's son and the parties agreed to a mistrial on that count. Before sentencing, the trial court denied Zepeda's motion for a new trial indicating the evidence was "overwhelming that [Zepeda] was the shooter. And the I.D.'s were very good in the court's opinion." The trial court sentenced Zepeda to the maximum term of 34 years to life in state prison.

CONTENTIONS

We appointed counsel to represent Zepeda on this appeal. After examination of the record, counsel filed an opening brief in which no issues were raised and which requested this court to conduct an independent review of the record. (*People v. Wende* (1979) 25 Cal.3d 436.) Zepeda has filed a supplemental letter brief in which he contends the inability to contest the trial court's ruling on his pre-trial *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) constitutes a denial of due process, the

eyewitnesses identifications should have been excluded, the evidence does not support the convictions and appointed appellate counsel has rendered ineffective assistance.

DISCUSSION

1. The Pitchess motion.

On day five of the 10-day trailing period, the trial court granted Zepeda's *Pitchess* motion after an in camera hearing.¹ After the in camera hearing, the trial court indicated it intended to grant the motion for "falsification of testimony[,] fabrication of evidence, false reports and perjury." The trial court indicated it had questioned the custodial witnesses under oath with respect to the contents of the "confidential log, the test correspondence and log computerized tracking system and the manual files, etcetera, divisional files, [and] ombudsman file" The trial court reported there "w[ere] no complaints" with respect to Officer Duran. However, with respect to Officer Salcedo, the trial court ordered a complaint filed by Eva B. on October 11, 1999, disclosed to the defense and indicated additional evidence would be presented the following day. With respect to Officer Terrazas, the trial court ordered the People to disclose a complaint filed by Dwayne C. on October 15, 1998.

On appeal, Zepeda contends that because the trial court's ruling on the *Pitchess* motion was the product of an in camera hearing, Zepeda is unable properly to contest the result, thereby denying him due process. Zepeda indicates he strongly believes officers

¹ A sealed reporter's transcript of the proceedings was prepared under separate cover for appellate purposes.

Terrazas, Arciniega and Duran, who formerly worked in the Los Angeles Police Department CRASH program, conspired to fabricate evidence and convict him unjustly because of his “place within the gang and his criminal history” which was “well known to these officers” Zepeda asserts the investigating officers in this case made misrepresentations to the witnesses, filed false police reports and fabricated evidence in the form of the dark blue sweat shirt recovered from Zepeda’s home in order to obtain a conviction.

Zepeda’s argument overlooks the fact the trial court granted the *Pitchess* motion as to all citizen complaints pertaining to “falsification of testimony[,] fabrication of evidence, false reports and perjury.” Because Zepeda’s *Pitchess* request was granted, he has no cause to complain about the manner in which the hearing was conducted. Moreover, the statutorily mandated procedure for conducting in camera hearings on *Pitchess* motions repeatedly has been recognized as striking an appropriate balance between the right of the accused to present a defense and a peace officer’s right to confidentiality. (See, for example, *City of Los Angeles v. Superior Court (Davenport)* (2002) 96 Cal.App.4th 255.)

2. Identification evidence.

Prior to trial, defense counsel sought to exclude the identification testimony of Cesar S. on the ground Zepeda’s photograph appeared at least twice in the books of photographs shown to him after the shooting thereby rendering the identification procedure impermissibly suggestive. Defense counsel argued the books should have

included only one photograph of each suspect because a witness who already has seen one photograph of an individual is likely to make a false identification of a second photograph of the same individual.

In opposition, the prosecutor argued the display of hundreds of photographs of members of the 38th Street gang had been fair. The trial court denied the motion.²

On appeal, Zepeda does not revisit this claim but asserts the photographic lineup shown to Cesar, Norma R. and Jesus was unduly suggestive and so conducive to mistaken identification as to constitute a denial of due process. (*Foster v. California* (1969) 394 U.S. 440, 442 [22 L.Ed.2d 402].) Zepeda asserts the shooter initially was described only as a tall, thin, male Hispanic and, on cross-examination, Cesar, Norma R. and Jesus each admitted Zepeda was the thinnest individual in the photographic lineup. Thus, Zepeda asserts the photographic lineup must have been unduly suggestive, giving rise to substantial likelihood of misidentification.³

“The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] ‘The question is whether anything caused defendant to “stand out” from the others in a way that would suggest the witness should select him.’ [Citation.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.)

² The trial court’s ruling in this regard was sound. (See *People v. Blair* (1979) 25 Cal.3d 640, 660-661; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 788-789.)

³ We address Zepeda’s claims regarding the photographic lineup, notwithstanding Zepeda’s failure to raise these issues below, in order to forestall a claim of ineffective assistance of trial counsel.

Moreover, there must be a “substantial likelihood of irreparable misidentification” under the “ ‘ ‘totality of the circumstances’ ’ ” to warrant reversal of a conviction on this ground. (*Manson v. Brathwaite* (1997) 432 U.S. 98, 104-107 [53 L.Ed.2d 140].)

We have independently reviewed the photographic lineup and conclude there is no substantial likelihood the photographic lineup was impermissibly suggestive. All of the individuals depicted in the photographic lineup were Hispanic males, generally of the same age, complexion, and build, and generally resembling each other. All of the subjects had hair of similar length and moustaches, were dressed similarly and four of the six had visible goatees. Thus, Zepeda’s photograph did not stand out and the identification procedure was sufficiently neutral. (*People v. Carpenter* (1997) 15 Cal.4th 312, 367; *People v. Wash* (1993) 6 Cal.4th 215, 244-245; *People v. Johnson* (1992) 3 Cal.4th 1183, 1217-1218; *People v. Marquez* (1992) 1 Cal.4th 553, 571-572.) The fact Zepeda may have been the thinnest individual in the photographic lineup is insufficient to render it unduly suggestive. (See *People v. DeSantis* (1992) 2 Cal.4th 1198, 1223 [“the mere wearing of an item of apparel of the same color as that recalled by the witness” does not render a photographic lineup unduly suggestive].)

Zepeda also claims the photographic lineup identifications made by Jesus S. and Norma R. should have been excluded because each initially refused to make an identification. Norma R. told Detective Arciniega shortly after the shooting that all she could see was a handgun and she could not describe the driver or the other passenger of the Caprice. Zepeda asserts Jesus was persuaded to make an identification by a detective

who had decided to make a 38th Street gang member the perpetrator of this crime. However, the evidence shows Norma R. and Jesus S. both were initially reluctant to identify Zepeda based on fear of gang retaliation. Norma R. was “very nervous” while she remained in the vicinity of the shooting and Jesus S. admitted he was afraid for the safety of his family.

Zepeda also claims Norma R.’s photographic lineup identification was improperly influenced by Detective Arciniega who told Norma R. how to identify the suspect. However, the evidence indicated Arciniega merely acted as a translator for Norma R. and that Norma R. was certain of her identification.

In sum, no basis upon which to exclude the photographic lineup identifications appears.

3. Sufficiency of the evidence.

Zepeda claims numerous circumstances indicate the evidence was insufficient to support the verdicts. None of these arguments is persuasive.

Zepeda asserts Jesus and Cesar gave conflicting descriptions of the length of the shooter’s hair, Jesus describing him as having short hair, and Cesar describing him as being bald. Also, Cesar said the shooter had no facial hair but Norma R. said the shooter had a mustache. Such minor discrepancies in the description of a suspect are insufficient to warrant reversal of a criminal conviction.

Zepeda also complains Cesar’s identification was suspect because he did not give an initial description of the shooter to the police. However, Cesar testified the officers

did not ask him for a description. Rather, they asked if he could identify the shooter and then took him to the police station and showed him photographs.

Zepeda claims Jesus's photographic lineup identification was "questionable" because Jesus could not remember identifying the photograph. However, at the time of the photographic lineup, 20 days after the shooting, Jesus was still in the hospital with IV tubes running and his arm in a cast. Thus, the jury readily could conclude Jesus did not recall making the photographic lineup identification because of his physical condition.

Zepeda next argues Cesar and Jesus had a very brief opportunity to observe the shooter as they drove past the corner, neither brother could describe any of the shooters' companions and Cesar admitted he ducked immediately when he saw the gun. However, these factual arguments, and the others advanced by Zepeda on appeal, were fully developed at trial and rejected by the jury. Thus, Zepeda's assertions amount to no more than a request that this court reweigh the evidence. This is not the function of an appellate court. (*People v. Diaz* (1992) 3 Cal.4th 495, 534; *People v. Barnes* (1986) 42 Cal.3d 284, 303.) Accordingly, whether considered singly or in combination, Zepeda's claims uniformly fail to warrant reversal of the conviction.

4. *No basis on which to substitute appointed appellate counsel appears.*

In the supplemental letter brief, and again in a letter filed February 7, 2002, Zepeda requests substitution of appointed appellate counsel. Having reviewed the entire record, we cannot say appointed appellate counsel's performance has fallen below an

objective standard of reasonableness under prevailing professional norms or that counsel's performance, or lack thereof, has resulted in any prejudice to Zepeda. (*People v. Lucas* (1995) 12 Cal.4th 415, 436; *People v. Wharton* (1991) 53 Cal.3d 522, 575.) Nor has Zepeda demonstrated that an order substituting counsel is needed to prevent ineffective assistance of counsel. (See, e.g., *People v. Marsden* (1970) 2 Cal.3d 118, 123.) Accordingly, the request for new counsel on appeal is denied. ⁴

We have examined the entire record and are satisfied Zepeda's counsel has complied fully with counsel's responsibilities. (*People v. Wende, supra*, 25 Cal.3d at p. 443.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P.J.

We concur:

CROSKEY, J.

KITCHING, J.

⁴ On January 8, 2002, pending independent review of the entire record, this court denied appointed appellate counsel's request to withdraw from the case which had been submitted only "in accordance with [Zepeda's] request."